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Russell v. Russell Le Roy

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JAMES H. KIERNEY,
Clerk.

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...E "BARNSTABLE" ...ES H. KIERNEY.

...AMSHIPPING COMPANY, Ltd.,

...TEAMSHIP "BARNSTABLE," PETITIONER.

v.

...L ET AL., OWNERS OF THE LATE

...SCHOONER "FORTUNA."

AND

...STON FRUIT COMPANY,

...SPONDENT TO PETITION.

BOSTON FRUIT COMPANY.

...AS. THEO. RUSSELL,

...THUR H. RUSSELL,

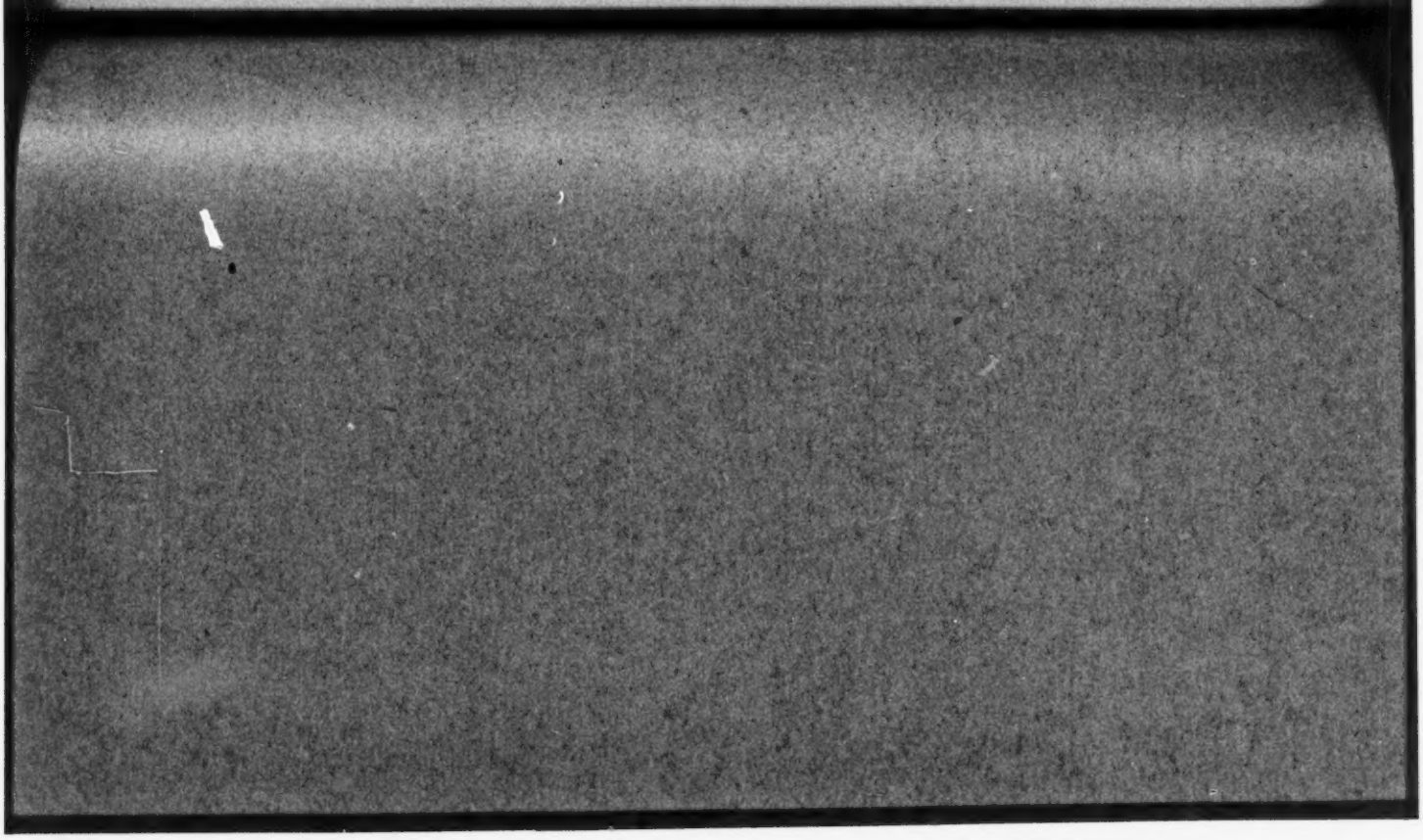
Counsel.

BOSTON:

...AM SAWYER & SON, PRINTERS,

...ast Printing House, No. 42 Lincoln Street.

1901.



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Supreme Court of the United States.

No. 484. October Term, 1899.

THE "BARNSTABLE,"
TURRET STEAMSHIPPING COMPANY, Ltd., Claimant,
Petitioner, Appellant,

v.

A. G. HALL et al., Libellants,

AND

BOSTON FRUIT COMPANY, Respondent, Appellee.

BRIEF FOR BOSTON FRUIT COMPANY.

Statement of the Case.

It is admitted that the only connection the respondent, the Boston Fruit Company, has with this litigation in tort for a collision loss, arises from a contract relation to the owner of the steamship "Barnstable," created by a charter party, to which reference will be made, and the construction of which is the question at issue.

The Record shows that the libellants' fishing schooner "Fortuna," while bound out upon a fishing voyage and off Cape Cod, was run down and sunk January 13, 1896, by the steamship "Barnstable" on a fruit voyage from Jamaica to Boston. The circumstances of the collision are not now material, as all parties have agreed that the collision "was caused by the

fault and neglect of those in charge of the navigation of the steamship 'Barnstable' at the time," without neglect or fault upon the part of the schooner.

Stipulation regarding Facts, Art. I., Record, p. 37.

The damages are also agreed, in the aggregate, $19,475, and a decree against the steamship entered for that amount and interest and costs.

Agreement for Damages, Record, pp. 35, 36.
Decree, *Id.*, p. 86.

The history and form of the litigation may have significance. Upon January 15, 1896, the owners of the schooner filed a libel for collision in the usual form against "the British steamship 'Barnstable' . . . her engines, boats, tackle, apparel, and furniture, and against all persons lawfully intervening therein in a cause of collision," etc.

Libel, Record, pp. 2–4.

Upon the filing of the libel, the master of the steamship, Captain Paine, filed a claim stating "that he is the master of the steamship 'Barnstable,' and that *as such master he is the agent of the owners and entitled to her possession*," and prays for delivery to him.

Claim, Record, pp. 4, 5.

Upon the same day, January 15, 1896, he stipulates for costs and to respond to any decree for damages, representing himself

in both stipulations as "*master of said steamship, and as agent of the owners, claimant*," and producing acceptable sureties.

Stipulations, Record, p. 5.

Upon February 20, 1896, one Nunan, a seaman injured in the collision, petitioned to join in the libel "against said steamship," etc., and was allowed to do so.

Nunan, Petition, Record, p. 6.

There was no further proceeding of record until April 8, 1896, when Mr. Kirlin filed an affidavit claiming that the "Barnstable" "was running under a demise charter to the Boston Fruit Company," and expressing an intention of the owner to summon such charterer "as a party that ought to be proceeded against in the present suit for the damage alleged," and praying that the ship-owner be substituted for and in place of the master as claimant of the steamship.

Affidavit and Order, Record, pp. 7–9.

Upon the same day the proctors for the ship-owner filed a petition reciting the litigation, alleging the charter party to the Boston Fruit Company; and, while denying fault in the navigation of the steamship, claimed that if there was negligence on the part of those in charge of the navigation of the steamship, "the persons thus charged with fault were the agents and servants of the Boston Fruit Company," and prayed "that said charterer may be brought in as a party under Admiralty Rule 59, and may be proceeded against in the same suit for such damages, for the reason that if said collision was caused or contributed to by any fault on the part of those in charge of the 'Barnstable,' such fault is ascribable to said Boston Fruit Company and its

servants, and not to said vessel herself, nor to your petitioner as the owner thereof."

Petition, Record, pp. 9–13.

The charter party relied upon in the petition is "Exhibit C."

Record, pp. 14–18.

After the filing of the petition, certain seamen upon the schooner, or their representatives (Emernan *et al.*, November 2, 1896, and Stewart, March 22, 1897), filed intervening petitions, reciting, among other things, the petition of the ship-owner against the Boston Fruit Company, and asking to amend the libel so as to include the Boston Fruit Company as a party respondent. No order amending the libel was made.

Emernan, Petition, Record, pp. 19–21.
Stewart, Petition, *Id.*, pp. 29, 30.

The Boston Fruit Company answered November 6, 1896, admitting the charter party, but denying liability under it for the alleged negligence and loss.

Answer, Record, pp. 25–27.

The agreement of facts filed May 12, 1897, admitted that the collision was owing to the fault and neglect of those in charge of the navigation of the "Barnstable" at the time, but not of the engineer, and was not caused or contributed to by the schooner (*Article first*); that the master, officers, engineers, firemen, and crew of the "Barnstable," at the time, had been appointed by the Boston Fruit Company, and were paid by it under and

pursuant to the charter party (*Article second*); that the "Barnstable" had been engaged under the charter party for more than six months before the collision (*Article third*); that no complaint was ever made by either party under clause 11 of the charter party (*Article fourth*); that there was no compulsory pilot on the steamship at the time (*Article fifth*); that the collision was caused by the negligence of the master, mates, or crew at the time in charge of the navigation of the steamship (*Article sixth*); that the master, mate, engineers, firemen, and crew appointed as provided in said charter party were the only persons at the time in charge of the navigation of said steamship, and responsible therefor (*Article seventh*); that (if the fact is material and competent) the Boston Fruit Company had no insurance upon the steamship, and the petitioner ship-owner carried a line of insurance on the vessel against sea perils, including collisions, but not for the full value of the vessel, the owner being in part uninsured (*Article eighth*).

Stipulation regarding Facts, Record, pp. 37, 38.

After argument, the United States District Court (Judge Brown) ordered a decree for libellants for the agreed damages against the steamship "Barnstable," and dismissed the petition of the ship-owner against the Boston Fruit Company, for the reasons stated in the opinion of the Court.

Final Decree, Record, p. 86.
Opinion of the Court, *Id.*, pp. 90–99.

Reported, —

Hall v. *SS.* "*Barnstable*," 84 Fed. Rep. 895.

The petitioner appealed to the Circuit Court of Appeals for the First Circuit, and that Court (Judges PUTNAM, WEBB, and ALDRICH sitting) affirmed the decree of the District Court dismissing the petition in an opinion by Judge WEBB.

Opinion, Record, pp. 103, 104.

Reported, —

The "Barnstable," 94 Fed. Rep. 213.

The case upon the same facts and issues presented, argued, and decided in the two lower Courts is before this Court by grant of petitioner's application for writ of certiorari.

ISSUE IN THE CASE.

As the Court, upon the agreement that the persons navigating the steamship were in fault for the collision, and that the damages were as agreed, found for the libellants against the steamship *in rem*, exonerating the Boston Fruit Company as charterer from liability to the libellants, and, as the libellants have taken no appeal, the sole issue is upon the petition of the ship-owner and the answer thereto of the Boston Fruit Company.

The libellants and intervenors by petition in the original libel have no present standing upon any claim against the Boston Fruit Company.

1. They have taken no appeal from the decree of the United States District Court, and are therefore bound by it.

2. In the intervening petitions of Emernan and Stewart (Record, p. 19; *Id.*, p. 29), under the admiralty practice, proceeding *in personam* against the charterer could not be joined

with the proceeding *in rem* against the steamship. The remedy is confined by Admiralty Rule 15 to a proceeding "against the ship and master, or against the ship alone, or against the master or the owner alone *in personam*."

Newell v. *Norton*, 3 Wall. 257.
The "*Atlantic & Ogdensburgh*," 1 Newb. 139.
"*Clatsop Chief*," 7 Sawyer, 274.
"*Zodiac*," 5 Fed. Rep. 220.

3. The attempt in these subordinate intervening petitions in behalf of the crew to join the charterer as respondent in the *in rem* libel against the steamship makes merely surplusage, presumably done *ex majore cautila* after the filing of the petition of the ship-owner against the charterer, with the expectation of allowance of a discontinuance against either after decision regarding liability. It is certain that none of the libellants can change the relation of ship-owner to charterer, or enlarge or lessen the mutual liability of either to the other under an express contract between them, by making allegations in the libel or petitions, or by the joinder of parties respondent.

The sole existing issue, then, is between the Turret Steamshipping Company, as owner of the libelled *res*, and the Boston Fruit Company, as the charterer, under the petition of the former filed under the 59th Admiralty Rule.

Should the decree of liability run solely, as decided by the courts below, against the steamship, or should it provide for a primary liability of the charterer, with recovery over against the steamship in case the charterer fails to respond to the decree?

ARGUMENT FOR BOSTON FRUIT COMPANY.

The Presumptive Liability is upon the Steamship.

It is admitted that the steamship is liable *in rem*, as the offending *res* to the libellants, regardless of ownership, lease, charter, or use.

1. The vessel guilty of fault for collision is treated in the admiralty as herself, sufficiently animate and reponsible to respond in damages. Upon this theory alone our admiralty procedure is founded, and the law of maritime lien and right of seizure justified.

"A ship is the most living of inanimate things. Servants sometimes say 'she' of a clock, but every one gives a gender to vessels. And we need not be surprised, therefore, to find a mode of dealing which has shown such extraordinary vitality in the criminal law applied with even more striking thoroughness in the admiralty. It is only by supposing the ship to have been treated as if endowed with personality that the arbitrary seeming peculiarities of the maritime law can be made intelligible, and on that supposition they at once become consistent and logical."

Holmes, Common Law, pp. 26–30.

Chief Justice Marshall in *U.S.* v. *Schn.* "*Little Charles*," 1 Brock. 347, 354, said: "This is not a proceeding against the owner; it is a proceeding against the vessel for an offence committed by the vessel, which is not the less an offence, and does not the less subject her to forfeiture because it was committed without the authority and against the will of the owner. It is true that inanimate matter can commit no offence. But this

body is animate and put in action by the crew, who are guided by the master."

Said Mr. Justice STORY in *U.S.* v. *Brig "Malek Adhel,"* 2 How. 210:—

"The ship is also by the general maritime law held responsible for the torts and misconduct of the master and crew thereof, whether arising from negligence or a wilful disregard of duty, as, for example, in cases of collision and other wrongs done upon the high seas or elsewhere within the admiralty and maritime jurisdiction, upon the general policy of that law, which looks to the instrument itself, used as the means of the mischief, as the best and surest pledge for the compensation and indemnity to the injured party."

So, in the case of the "*China*," 7 Wall. 53, the fact that the collision was owing to the fault of a pilot compulsorily employed did not excuse the ship in the *in rem* proceeding.

"If charterers are owners for the voyage and appoint the master and crew, the ship is still liable. If she were navigated by pirates who had run away with her, she would, in my opinion, be responsible to the injured vessel." (LOWELL, J.)

The "Arturo," 6 Fed. Rep. 308, 313.

And see

The "Atlas," 93 U.S. 302.
"*Siren*," 7 Wall. 152.
"*Ticonderoga*," Swabey, 215.
"*Leamington*," 2 Asp. Mar. Law Cas. 475.

2. The only connection of the Boston Fruit Company with this litigation is invoked under the operation of Admiralty Rule 59, promulgated March 26, 1883 (112 U.S. 743), allowing the claimant of a libelled vessel upon petition to have process against another vessel or party claimed to have been in fault.

The object of this rule is stated by this Court

In re N.Y., etc., SS. Co., 155 U.S. 523.

"This rule provided for procedure through which, in a suit against one vessel for damage by collision, process might be issued in the same suit against any other vessel charged with contributing to the same collision or any other party, and for proceedings thereon" (p. 528).

And see

The "Alert," 41 Fed. Rep. 836.
"Hudson," 15 *Id.* 162.

The 59th Admiralty Rule, like all the Admiralty Rules of the Court, necessarily relates and is confined to form of remedy. It can not and does not impose liabilities, or change the legal or equitable rights of parties brought under it into one litigation. Its operation is limited merely to procedure.

U.S. Rev. Sts., sect. 913.

3. The issue upon this appeal is confined to the contractual relation of the ship-owner to the charterer, and this necessarily depends entirely upon the terms of the contract between them. There is no question here of possible personal liability of the charterer to the libellants, because (1) the libellants cannot proceed against charterer jointly in libel against vessel (15th Admiralty Rule); (2) they have not attempted to do so in the original libel which is the basis of the litigation; and (3) they have not appealed from and are therefore bound by the decree of the district court relieving the charterer from liability for the collision.

The case is to be distinguished from cases where charterers have assumed such control over or such relations to a vessel that they in legal effect hold themselves out to outside third parties as liable for damage done by the vessel or agents and are directly sued by such third party.

As under the law of partnership or agency there may be one liability to a third party, and a very different degree of liability to the co-partner or principal, the extent of the liability to the latter depends upon the exact agreement between the parties, and not upon what the outside world may have the right to infer from acts or representations in dealing with the partner or agent.

4. The case then is one in which the libellants as the injured party have recovered against the vessel as the injuring *res*, judgment from which no appeal has been taken by them. The owner of the *res* claims that the charterer is liable, and seeks recovery over against it precisely as though the ship-owner had paid the libellants and was seeking indemnity. The burden is upon the ship-owner to establish this liability to him. The presumption is, that, as the vessel is the offending *res*, her owner is her representative to respond to the maritime lien existing upon his property.

Joyce v. *Capel*, 8 C. & P. 370.
Hibbs v. *Ross*, L. R., 1 Q. B. 534.
Fraser v. *Cuthberson*, 6 Q. B. D. 93.
Chasteauneuf v. *Delange*, 7 App. Cas. 127.

"To give so broad an interpretation to words of exception inserted by the carrier and for his benefit would be contrary to settled rules of construction, and would render nugatory many of the subsequent stipulations of the bill of lading." (Justice GRAY.)

Compania, etc., v. *Brauer*, 168 U.S. 104, 124.

The ship-owner, by the petition, assumes the burden of proof, and makes the issue depend entirely upon the construction of the contract of charter. He relies and must rely upon an express contract; and the only question is whether under its terms the ship-owner primarily can turn the natural and presumed liability of the vessel for a collision loss into a personal liability of the charterer in a proceeding in legal and equitable effect between ship-owner and charterer alone.

Rules for Construction of the Charter Party.

The Court, therefore, in dealing with the express contract of charter to determine the mutual rights and liabilities of the parties to it *inter se* should construe it in the light of the well-settled rules of construction of commercial agreements made between commercial parties competent to contract, inclined to terseness in language and intending that every clause and word should have meaning, and looking to intention rather than to form of expression. There is no presumption that in such commercial contract idle or unnecessary language was used.

"In construing a commercial contract, the object must be to arrive at the real intention of the parties to it. It is that, so far as it can be ascertained, which must determine the meanings of the words and phrases used, their materiality and their dependence one upon another. But the intention must be judged of from the expressions which the parties themselves have given of it, not by reference to what might probably or ought in fairness to have been the intention."

Carver, Carriage by Sea, § 164.

We refer to the following familiar rules of construction as applicable to the charter party before the Court: —

First. The charter party as a commercial contract is to be liberally construed in furtherance of the apparent intention of the parties to it.

Raymond v. *Tyson*, 17 How. 53.
Rich v. *Parrott*, 1 Cliff. 55.
Donahoe v. *Kettell*, *Id.* 141.
Richardson v. *Winsor*, 3 Cliff, 402.

Second. The meaning is to be ascertained by the whole instrument; and every clause and word must be given effect, and that construction of the whole adopted which will best, or most nearly, recognize a meaning and force in each clause and word.

"I think each part of the contract must be looked at with care." (Lord HALSBURY.)

Hogarth v. *Miller*, L. R. (1891) App. Cas. 48. 53.
Glynn v. *Margetson*, L. R. (1893) App. Cas. 351.

"Every clause and even every word should, when possible, have assigned to it some meaning. It is not allowable to presume or to concede, when avoidable, that the parties in a solemn transaction have employed language idly."

Bishop, Contracts, § 384.

"The construction is to be such that the whole instrument or contract and every part of it may take effect if it be possible with the rules of law and the intention of the parties."

Metcalf, Contracts, pp. 287, 288.

"It is a rule that the whole of a contract should be considered in determining the meaning of any or of all of its parts. The reason is obvious. The same parties make all the contract, and may be supposed to have had the same purpose and object in view in all of it; and, if this purpose is more clear and certain in some parts than in others, those which are obscure may be illustrated by the light of the others. . . . All the parts of a contract will be construed in such a way as to give force and validity to all of them and to all of the language used where that is possible."

2 Parsons, Contracts, p. 500.

"In determining the meaning or effect of a clause, the document is regarded as a whole, — one part of it may throw light on another part; and, as far as possible, effect is to be given to all parts. The presumption is that each clause has, or may have, some effect; and a construction of another part of the document which would make the clause inoperative or useless is to be avoided."

Carver, Carriage by Sea, § 173.
Lawrence v. *Aberdein*, 5 B. & Ald. 107, 115.

"In the interpretation of the charter party a meaning must, if possible, be given to every part of it."

Leggett, Charter Parties, p. 4.
Morris v. *Levison*, L. R., 1 C. P. D. 157.

"In the construction of charter parties, as of all instruments,

a construction which gives effect to all the words and provisions is preferred to one which does not."

1 Parsons, Shipping & Adm., p. 319.

Third. The construction of the charter party will in doubt be against the party claiming an exceptional right or release from liability.

"If some of the words of a written agreement, after the whole agreement has been considered, are capable of more than one construction, that interpretation is to be preferred which is least favorable to the party upon whom an obligation is imposed, or in whose favor an exception from or modification of an obligation is created by those words."

Leggett, Charter Parties, p. 30.
Alrey v. *Merrill*, 2 Curtis, 11.

Fourth. Where the parties to the contract have put a practical construction upon it, that construction will be adopted by the Court.

"We think that the practical construction which the parties put upon the terms of their own contract, and according to which the work was done, must prevail over the literal meaning of the contract." (MATTHEWS, J.)

Dist. of Columbia v. *Gallaher*, 124 U.S. 505, 510.

"Where the terms used are indefinite or capable of more than one meaning, or if the materiality or effect of a clause is doubtful, the doubt must be solved by reference to the meanings

which the parties probably attributed to those terms or provisions when they made the contract."

Carver, Carriage by Sea, § 165.
Leavitt v. *Windsor Co.*, 54 Fed. Rep. 439.
Davis v. *Shafer*, 50 *Id.* 764.

The Charter Party does not impose Collision Liability upon Charterer.

As the question depends upon the express terms of the written contract of charter, and the proper inferences therefrom construed under familiar rules and principles, the Court will obtain little assistance by appeal to any general law of bailments. The question is not, Was this a general bailment? but, What were the terms and conditions of the bailment? What liability did bailee assume toward the bailor, and what rights and consequent liabilities were reserved to the bailor by expression or necessary implication?

It is begging the question to assume that the contract is an unqualified demise of the ship, and then argue from the false premise the application of an undisputed rule of the law of bailments.

It is therefore immaterial and unsatisfactory to attempt to decide the disputed liability *inter se* for collision by endeavor to settle whether the contract under construction is a demise of the vessel or a mere hire for carriage; it obviously is neither. Many of its provisions are wholly inconsistent with any claim of a demise or lease, and other provisions are inconsistent with any claim that the contract is a mere contract of carriage.

The issue is not settled by a finding that the contract is or is not a demise or general bailment. The question remains,—If a demise, what limitation or assumption of liability for collision

was contracted for? If not a demise, what liability for collision was assumed or reserved as between the parties?

The answer involves examination of the terms of the express contract, and the construction of the contract under accepted rules.

The contract of charter (Record, pp. 14–18) is in numbered articles, and reference is here made to each.

First. No express assumption by the charterer of liability for collision is claimed. With all the other express assumptions of liability, the contract is entirely silent in regard to this well-known risk. If such great liability was assumed by charterer it was done merely by implication.

Second. As showing that this contract was not an ordinary demise of the vessel, attention is called to the fact that the contract provides for the hire of "two good screw steamships to be built," and indorsed upon the charter party are the requirements in regard to dimensions and build (Charter Party, Record, p. 17). The contract was, therefore, *in futuro* in operation, and was to build the two vessels as a necessary preliminary to their use. The vessels were to be and were completed a year after the date of the contract.

The clauses in the contract upon which the ship-owner must mainly rely to establish his claim of an implied assumption by charterer of liability for collision are clauses 1, 2, and 3 (Record, p. 14), providing for the hire of the two steamships for thirty-six months for the prescribed voyages (Article 1); the charterers to provide and pay for oils and stores, appliances for loading and discharging cargo, and provisions, and wages of captain, officers, engineers, firemen, and crew, who, excepting engineer (for six months), were to be appointed by the charterer (Article 2); and charterers are to provide and pay for all coal-port charges, etc. (Article 3).

See Charter Party, Arts. 1, 2, 3, Record, p. 14.

It is submitted: —

1. Even the appointment and pay of the master, if agreed to without qualification, would not be conclusive of liability as between ship-owner and charterer. The fact is merely one fact to be considered with all the other terms of the charter party. Whatever the liability might be to a third party, as between the parties to the contract, the question remains upon the construction of the contract *inter se*.

2. There is under the charter party no such demise of the vessel as to raise the implication that the charterer assumed the liability for her torts, except as expressly agreed.

The first three articles upon which petitioner's claim rests contain provisions which show that there was no exclusive or unlimited possession given to the charterer.

ARTICLE 1. The charterers "hire" the vessel, and she is to be "placed at their disposal." But her employment is limited to certain voyages and waters.

ARTICLE 2 divides the expense of the vessel. The charterer is to pay for stores, wages, and provisions, and to appoint the captain, officers, and crew. Owners are to appoint the chief engineer for six months. But (*a*) a limitation is put upon the pay, — not to exceed that paid by the charterers in similar vessels, — and (*b*) the owners are to maintain the vessel in a thoroughly efficient state in hull and machinery for the service, including winches with chain gear and donkey boiler. The ship-owner assumes this duty, and, by necessary implication, the possession for the purpose of maintaining the proper repair.

ARTICLE 3 provides that charterers shall pay for all coals, fuel, port charges, pilotages, agencies, commissions, and other charges, excepting for painting and repairs to hull and machinery and anything appertaining to keeping the ship in proper working order, — the repairs, as far as possible, to be done on board by the steamer's staff.

It was wholly unnecessary to provide that charterer should pay for these things if there was a demise of the vessel to the charterer.

ARTICLE 4 provides for payment of charter money semi-monthly. In default of payment the owner can "withdraw said steamer from the service of the charterers" without prejudice, etc. It does not say "repossess" or "take the vessel back," as would be expected in the case of lease or demise, but simply may "withdraw her from the services of charterers."

ARTICLE 5 is wholly immaterial and unnecessary if the charter operated as a demise.

It provides where charterer could load and discharge cargo. If he had full possession and control, the provision was unnecessary.

ARTICLE 6 is likewise unnecessary, on petitioner's theory, in providing that charterer might have use of the whole reach, burthen, and passenger accommodation of the ship, reserving space for officers, etc. The article further provides that cargo can be taken on deck "*at charterer's risk*."

If the vessel's torts and liabilities were at the charterer's risk, why provide for this single liability and expressly put it upon the charterer?

ARTICLE 7 in similar manner puts the expense of loading and discharging upon the charterer, and the "stowage to be under control of master," and "the charterers shall be responsible for the same." Why name this responsibility if it existed under the general tenor and form of the charter party? Why expressly provide liability of charterer for certain acts, and omit collision? The specification of the liabilities assumed by charterer is a necessary exclusion of those not enumerated. So the charterer is to find ballast and dunnage, — an unnecessary provision if he had entire possession and control.

ARTICLE 9 requires owners to dock and paint at their expense every six months if required by charterer, and the time so occupied shall not be paid for by charterer. This is a limitation upon the charterer's possession.

ARTICLE 10 is important, as it expressly defines the extent of

charterers' liability for the acts of master. He is to be under their orders and directions "*as regards employment, agency, or other arrangements, and the charterers hereby agree to indemnify the owners for all consequences and liabilities that may arise from the master signing bills of lading by their orders, or those of their agents, or in otherwise complying with same; the master, although appointed by charterers, to be satisfactory to the qwners.*" EXPRESSIO UNIUS EXCLUSIO ALTERIUS. What effect has this clause upon petitioner's contention? If owners had no responsibility for master, it was unnecessary to exempt themselves from liability for his bills of lading. The express exemption of this liability implies a continuance of liability for his other acts and torts.

It is only upon this theory that the succeeding clause — that "master shall be satisfactory to owners" — has meaning. This is an implied assumption of liability by ship-owner for master's acts and torts, except as otherwise expressly agreed, and the ship-owner protected himself by imposing the condition that the agent for whom he was responsible should be satisfactory to him.

ARTICLE 11 gives the owners still greater control over the master. If the charterers complain of chief engineer during the first six months, the owners are to investigate, and, "if called upon, make a change in the appointments when the steamer is in." Then immediately follows, in written words, the significant provision: "Owners have same privilege as regards captain and officers and engineers during continuance of charter."

The provision might be construed to mean that the owners have the same control over captain and officers as over engineer during the first six months; that is, complaint must be made by charterer to owner and the owner is to investigate the complaint, and, if called upon, make a change. Upon any construction of the clause, the owner had some control over the captain and officers and their continuance in employment.

ARTICLE 13 returns to charterers any hire paid in advance in case vessel should be lost.

ARTICLE 14 gives an option to charterers to purchase.

ARTICLE 16 gives owners a lien on cargo for charter money, and gives charterers lien on vessel for advanced hire not earned. Why give charterer lien on the vessel for unearned freight if vessel was entirely in possession and under control of charterer? Unqualified possession of itself would give the lien.

ARTICLE 17 provides for loss of time from collision or other damage. Such time is deducted from charter money; and if vessel puts into port of distress all charges and expenses are borne by the owners, and "charterers are covered as to expenses to the same extent as the owners are by their insurance." If, then, the steamship had been damaged by this collision she would immediately be at the expense of owners for repair, and in their possession. Was it the intention of this charter party to make a distinction between receiving and inflicting damage by a collision? Was the former intended to be at the expense of the owners, and the latter at the expense of the charterer? Yet the contention of the ship-owner would lead to the peculiar conclusion, that, under this contract, the ship-owner shall pay the damages done by collision to his own vessel, and the charterer must pay the damages done by her in the collision to another vessel. No such division of liability is justified by the contract. Suppose that the steamship had been damaged in this collision to the extent of $10,000, and the schooner $20,000, and that both vessels were found in fault. Under the decision in the *North Star* (106 U.S. 17) the steamship would pay to the schooner one-half of $20,000 less one-half of $10,000; that is, the net sum of $5,000. Upon the theory of the petitioner, as he assumes the repairs to his steamship, he alone would be entitled to the benefit of the $5,000 charged to the schooner, and the charterer would be liable for the $10,000 charged to the steamship for running down; so that, although only $5,000 were paid by steamship to schooner, the charterer would be liable to the petitioner for $10,000. It is submitted that no such construction of this contract is justified by its terms. The

liability to repair damage to the steamship by collision is the same as the liability to pay damages for the collision, — both classes of losses coming within the protection of the insurance.

ARTICLE 18 requires charterers to put in bills of lading the usual "negligence" clause. Why, if charterer, and not vessel, was liable for the acts of the master?

ARTICLE 20 requires owners to furnish a passenger certificate for twenty-four passengers, and fit vessel for their carriage. The owners have possession for this purpose.

ARTICLE 23 divides the benefit of all derelicts and salvages equally between owners and charterer. The master, then, in performing a salvage service must act for both. He is as much the agent of the owners as of the charterers. Suppose in performing a salvage service for this joint benefit he comes into collision, is the charterer to be held responsible for the damage done?

THE CONTRACT IS NOT AN UNQUALIFIED DEMISE OF THE STEAMSHIP.

Under the *first* and *second* rules of construction referred to, it is submitted that, upon the petitioner's theory of a demise and general assumption of liability by charterer, no effect or meaning is given to many of the provisions of the charter party. Reference is especially made to these: —

1. All agreements therein by the charterer to pay for stores (Article 2); to provide coals, etc. (Article 3); to allow charterer to direct place of loading and discharge (Article 5); that charterers shall bear expense of loading and discharging (Article 7); shall order master as regards employment, agency, or other arrangements (Article 10); that charters shall have lien on vessel for advanced and unearned freight (Article 16), — are utterly unnecessary if the charterers had such control and

management as to impose a general liability upon them *inter se* for the torts of the ship.

2. The express exemptions of owners from liability for the carriage of deckload (Article 6); for liability for the stowage (Article 7); for "all consequences or liabilities that may arise from the master signing bills of lading" (Article 10); that the bills of lading shall contain the usual "negligence" clause, — necessarily imply, as matter of reasonable construction, that the vessel remained under general liability, except as expressly provided in these exemptions and agreements.

The Insurance Clause.

Any doubt as to the liability *inter se* of ship-owner or charterer for a collision loss is removed by the express agreement in regard to insurance.

Article 22 of the charter party (Record, p. 16) provides "that the owners shall pay for the insurance on the vessel."

In connection with this is the agreement in Article 17, that if, in consequence of collision or other specified causes, the vessel should put into a port of refuge, the expense shall be borne by the owners; but, if driven into port by stress of weather, the loss of time shall fall upon charterer. "It is understood, in the event of steamer, from above causes, putting into any port or ports other than those to which she is bound, that the charterers are covered as to expenses as the owners are by their insurance." That is, the owners will indemnify the charterers for such expenses to the extent that the same are collected of the underwriters upon owners' insurance.

It is not contended, as argued by ship-owner, either that these clauses give the charterer the benefit of owners' insurance (except, possibly, to the extent provided in Article 17); or, that the owner was under obligation to insure either against peril

of the seas or against running down. If the owner preferred to assume the risk and insure himself, he had the right so to do.

The vital importance of these provisions regarding insurance lies in the necessary inference in construing this contract, that the owner assumed any risk that could be insured against by him. The Court is seeking the intention of the parties, and it must be admitted that the intention regarding liability for running down is left to inference.

It is a fair and natural inference that a party to a contract of lease or hire intends to assume a risk which he expressly agrees to insure against. This is all of our contention. If the owners did not intend to assume the collision risk, they would not have assumed to pay for the insurance against it. If the ship-owner paid the insurance, he was to have the benefit of it as the indemnity for his loss in satisfying lien upon his vessel for collision. The clause otherwise would be misleading, as it induced charterers not to insure. If charterers had insured, it might be double insurance. Two parties would be insuring the same risk. The clear and necessary implication is that the owners understood and agreed that a collision loss should belong and remain on the vessel and they would protect themselves from it by insurance. This section defeats any presumption from other language in the charter party that this insurable risk was assumed by the charterer.

As stated by Judge BROWN, "This express assumption by the owner of the cost of indemnity I regard as a most unequivocal expression of an intention to assume and to relieve the charterer from all risks that would be covered by 'the insurance on the vessel,' for which the owner was to pay."

Opinion, Record, p. 93.

1. As the importance of these insurance provisions bears only upon the intention of the parties upon the question of con-

struction, it is immaterial to inquire whether insurance against perils of the sea would or would not include the running-down risk. In Massachusetts it would.

Nelson v. Suffolk Ins. Co., 3 Cush. 477.

In the United States Courts it probably would not.

Ins. Co. v. *Sherwood*, 14 How. 351.

There can be no doubt that the owner assumed in the agreement to pay for insurance on the vessel (Article 22), and such insurance and what should be included in it for his protection were matters entirely in his discretion. It is admitted (Agreed Facts, Article 8, Record, p. 38) that he "carried a line of insurance on the vessel against sea perils, including collisions, but not for the full value of the vessel." He had an option to insure or not, and to decide the amount and nature of risk he would insure, and the risk he would assume without insurance.

2. The argument of the ship-owner regarding the position of the insurance clause in this charter party assists the contention of the charterer. The argument is that this article (22) naturally and historically, in the ordinary form of such charter parties, belonged somewhere in Article 2, specifying what expenses were to be assumed by the ship-owner.

It is submitted, —

(*a*) The obvious fact that the insurance clause was taken out of such context, and made a separate article in the contract, merely emphasizes its importance and meaning in showing the most deliberate intention of the parties that the ship-owner should assume every insurable risk not expressly excepted in the contract.

(*b*) This insurance clause is not negative, — that charterer need *not* pay for insurance, — but affirmative, that the owners *shall* pay for the insurance.

(*c*) It is difficult to see any difference in legal construction and effect, whether the provision was made an independent article in the contract or was added to any general provision fixing the liabilities assumed by the ship-owner. The agreement wherever inserted is a material part of the contract, and must be recognized as such.

The ship-owner's contention comes to this: He has insured the vessel against running down to the extent he saw fit, and presumably can collect or has collected from the underwriter the amount of insurance. If the prayer of the ship-owner against the charterer is granted by the Court, then the ship-owner will be entirely relieved, and so relieve the underwriter from any claim to respond to the libel. The underwriter is relieved at the expense of the charterer. The litigation here must be regarded in legal consequence as for the benefit of the underwriter in the name of the ship-owner, to impose the insurable and insured risk upon the charterer, although insured against and paid for by the ship-owner. What did the ship-owner intend when he insured the collision risk and paid the premium therefor? What did the underwriter assume when he accepted the risk and took the premium? Was the risk simply the solvency of the charterer? If the ship-owner, or his underwriter in his name, can enforce a primary liability for running down upon the charterer, and the latter is able to respond, the underwriter has given no consideration for the running-down premium paid by the ship-owner, and presumably charged to and paid by the charterer in the charter money.

It is submitted that in determining the intention of the parties to this charter party, it must be presumed that the ship-owner intended to get a *quid pro quo* from the underwriters, and by the insurance to relieve the charterer from any liability which

could be covered by insurance. Whether the premium paid for such indemnity is "a fixed charge," or provided by special agreement, it was paid by the ship-owner for some other purpose than to relieve the underwriter by imposing liability upon the charterer.

The Construction of the Contract by the Acts of the Parties.

The *fourth* rule of construction, referred to above, has peculiar application, because the ship-owner has put a practical construction upon the charter party, and accepted under it the fact and intention that liability for collision belonged to the vessel and not to the charterer.

The acts of the parties are agreed in the stipulation.

Article Eighth, Record, p. 38.

(1) The Boston Fruit Company had no insurance upon said steamship.

(2) The ship-owner carried a line of insurance on the vessel against sea perils, including collisions, but not for the full value of the vessel, the owner being in part uninsured.

This affirmative action in getting insurance by the ship-owner, and the negative action by the charterer in not doing so, are competent evidence in strong support of our contention regarding the intention of the parties. It is not probable that the charterer intended personally to insure the ship-owner against the running-down risk, and took out no insurance to protect himself against such risk.

Cases cited *supra*.

In further confirmation of this contention is the action of ship-owner, through the master, in claiming vessel after libel was filed, and giving the required stipulations to respond to the decree. Not until April 8, 1896 was any indication shown to hold the charterer as a party in interest.

Claim, Record, p. 4.
Stipulations, *Id.*, p. 5.

(3) Mr. BENNETT, the ship-broker who negotiated the charter party, and drafted it, had the interviews explained by him with the representatives of the ship-owners.

Bennett, Evidence, Record, pp. 39–67.

Upon cross-examination (Int. 64, Record, p. 44) he says: "I have had a good deal of experience in various insurance claims, — so much so that I clearly explained to the owner that he would have to pay for all insurance on the vessel in any way, shape, and manner, against stranding, collision, and everything, as is usually done in all vessels, unless he wanted to take the risk and not insure." The statement is not contradicted.

The owner, then, assumed the insurance risk with full knowledge of the consequences, and of the liability upon him or his underwriter in case of collision.

The evidence was held competent by the Court as proving that his attention was particularly called to the provision, and as interpreting and making certain the terms.

Lonergan v. *Buford*, 148 U.S. 581, 588.

The evidence is a circumstance surrounding the adoption of the contract, of assistance in determining the subject-matter and

meaning of the insurance provision and the standpoint of the parties in relation to it.

Fire Ins. Asso. v. *Wickham*, 141 U.S. 564.
Clay v. *Field*, 138 *Id.* 464.
Mobile, etc., R.R. v. *Jurey*, 111 *Id.* 584.

(4) The negative evidence from the ship-owners' witnesses —that, under a charter imposing the duty of insuring upon the ship-owner, no case is known of an attempt to hold charterer liable for the insurable risk — is entitled to weight.

Mr. GOURLIE (the noted average adjuster and writer) says: "To me that is novel. I have never known it to be done."

Cross-Ints. 35, 36, Record, p. 71.

Mr. CADIZ says: "I never knew of a case."

Cross-Int. 20, Record, p. 77.

Mr. HALL has never known a case where a ship-owner, having agreed to pay for the insurance on the vessel, made a claim upon the charterer for any damage by running down.

Cross-Int. 68, Record, p. 82.

Mr. BARBER says: "Where the owner agrees to pay for the insurance, he has the benefit of it; if the charterer is to have any interest in it, it must be expressly so provided; the owner paying for the insurance is, in the commercial meaning of the expression, to assume the risk and pay for it. He has never

known a case where, under a provision that the owner shall pay for the insurance, the owner has made claim upon the charterer for a running-down loss.

Cross-Ints. 21–25, Record, p. 85.

Authorities Cited.

If the contention of the charterer above submitted be correct, that the question before the Court depends upon the construction of a special express contract between ship-owner and charterer, little assistance is afforded by reported cases. The ship-owner admits and argues that the contract in its provisions, and in the context of them, is peculiar.

There are two general points of distinction from cases relied upon by the petitioner.

1. The controversy is confined to the contractual relation of ship-owner to charterer, arising from the written contract of charter. The only interest of the libellants as a third party, outside any contract, is to recover from the vessel; and the decree, from which they take no appeal, gives this right. What right the libellants would have to sue in tort the charterer, as held out to have assumed responsibility, it is immaterial to inquire. The libellants have recovered from the vessel, and the only question here is, in effect, whether the ship-owner can, by virtue of his contract, recover over against his charterer.

2. The cause of action is based not upon contract, but upon maritime tort, for which libellants can look to vessel as the tort feasor.

Even under these limitations the courts refuse to recognize as a demise of a vessel any agreement which does not give to the charterer "complete and absolute control."

"Stipulations that the general owners shall keep the vessel in good condition during the existence of the charter, and receive on board certain goods at the request of the government and refuse to receive other goods without its assent, would be out of place and inappropriate if the government were at the same time special owners of the vessel for the service stipulated, having the vessel in its entire possession and control. Great weight was given to similar clauses by the King's Bench in *Saville* v. *Campion* (2 B. & Ald. 511), and by the Supreme Court of New York in *Clarkson* v. *Edes* (4 Cowen, 477). In each of these cases they were held conclusive that the possession and control of the vessel had not passed to the charterer, but had been retained by the general owner." (Justice FIELD.)

Leary v. *U.S.*, 14 Wall. 607, 612.

Cited with approval, —

U.S. v. *Shea*, 152 U.S. 178.

The case relied upon of *Baumwell, etc.*, v. *Furness* (1893), App. Cas. 8, has no application to the *inter se* contract relations between the parties to the charter party in litigation.

In that case the shippers of cotton sued the ship-owner for loss under bill of lading given by the master as agent of the charterer.

The charter party provided, as in this case, that owners were to be relieved "from all consequences or liabilities that may arise from the captain signing bills of lading." It was an action of contract by shipper against ship-owner, and depended upon the authority of the master of the chartered vessel to bind the owner to personal liability under the bill of lading. The Court reversing the decision of the lower court [(1891) 2 Q. B. 310]

held the ship-owner not responsible. He stood in no such relation to the master as to be personally bound to the holder of the bill of lading by the acts or fault of the master.

So in *Meiklereid* v. *West*, 1 Q. B. D. 428, the ship-owner was found not liable in a personal suit upon an allotment note given to a sailor by the master of a demised vessel.

It is submitted that the case before the Court depends entirely (1) upon the construction of the charter party in suit, and (2) upon the mutual relations under it of the parties to it without regard to outside third parties, and (3) that the proper construction of its terms in connection with the contemporaneous acts of the parties to it will not justify the transfer of the admitted and decreed liability of the vessel for this collision loss from the ship-owner to the charterer.

The Boston Fruit Company submits that the decree should be affirmed, with costs.

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Br. & Carver & Blodgett for Appt

Supreme Court of the United States.

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TURRET STEAMSHIPPING COMPANY, Ltd.,
CLAIMANT OF STEAMSHIP "BARNSTABLE," PETITIONER,

vs.

A. G. HALL ET AL., LIBELLANTS AND INTERVENING PETITIONERS, OWNERS AND CREW OF LATE SCHOONER "FORTUNA,"

AND

THE BOSTON FRUIT COMPANY,
RESPONDENT

BRIEF FOR A. G. HALL ET AL.

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THE HEINTZEMANN PRESS, BOSTON.

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AND

THE BOSTON FRUIT COMPANY, RESPONDENT.

BRIEF FOR A. G. HALL ET AL.

It is admitted in this case that a decree was properly entered in the District Court in favor of A. G. HALL ET AL., libellants and intervening petitioners, against the steamship "BARNSTABLE" and her claimant, and no appeal has been taken from that decree. The only question involved is whether the decree should have been also entered against the BOSTON FRUIT COMPANY. And it is admitted that whatever the

decision of this court may be as to whether or not the decree in favor of said libellants and intervening petitioners should have been entered also against the BOSTON FRUIT COMPANY, that in any event a decree in their favor must be entered against the steamship "BARNSTABLE" and her claimant.

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Libellants and Intervening Petitioners.